IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TINA NEGRON	:	CIVIL ACTION
V.	:	
WILLIAM HENDERSON, in his official capacity as Post Master General, UNITED STATES POSTAL SERVICE	:	N0.99-CV-4472

Memorandum

McLaughlin, J. May 16, 2001

I. Introduction

Plaintiff, Tina Negron, is suing William Henderson, in his official capacity as Post Master General, and the United States Postal Service for disability-based discrimination under the Rehabilitation Act of 1973 and its implementing regulations. 29 U.S.C. 791 et seq.; 29 C.F.R. 1614 et seq. The plaintiff, who suffers from ankle tendinitis, alleges that the defendant discriminated against her on the basis of her disability by (1) transferring her to light duty in North Philadelphia rather than allowing her to continue as a letter carrier, (2) transferring

her to an undesirable shift at the 30th St. Post Office, (3) investigating and suspending her for mail theft on August 4, 1998, (4) terminating her employment in November 1998, (5) opposing her in various proceedings relating to the mail theft and to her termination, and (6) refusing to reinstate her after she was acquitted of the criminal charges. The Court holds that plaintiff's claims are time-barred insofar as they relate to any actions taken by the Postal Service prior to January 8, 1999. The Court grants summary judgment on the remaining claims, because the plaintiff has failed to show that the Defendant's proffered reason for its actions was pretextual.

II. Legal Standard for Summary Judgment

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of .

fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3rd Cir. 1993).

111. Undisputed Facts

On October 15, 1994, plaintiff Tina Negron began working as a letter carrier in North Philadelphia with the United States Postal Service. On February 27 1996, Negron injured her ankle and back while delivering mail. (Pl. Ex. B). Following the accident, she cased mail in the Post Office in Philadelphia for a few days. After she started delivering mail again, Negron was given a cart with three wheels and a hand brake to use. (Def. Ex. 3, 20-21).

On March 19, 1998, Negron suffered a cramp in her left ankle and was diagnosed as having ankle tendinitis. (Pl. Ex. D). She returned to work on March 24, 1998 with a note from her doctor, stating that Negron should not stand for more than 15 minutes at a time and that she should keep her foot elevated. (Def. Ex. 3, 23-24, Pl. Ex. C). With these limitations, she was assigned to limited duty work within the North Philadelphia station, which

consisted of light clerical work and answering telephones. (Def. Ex. 3, 27-28).

Around April 23, 1998, Negron was informed that she would be transferred to night duty from 8:30p.m. to 5:00a.m. at the 30th Street Post Office. (Def. Ex. 5). At the 30th St. Office, she was responsible for "3579 work", which consists of dealing with undeliverable mail. During this process, first-class mail is separated out and returned to the sender. The address labels are then torn off the remaining mail and placed in an envelope to be sent to the postmaster. The mail itself is thereupon discarded. (Pl. Ex. A).

On August 4, 1998, Postal Service inspectors conducted surveillance on another employee in Negron's unit, Elaine Leathers-Harris, who was suspected of having removed materials from the mail. According to the Postal Service, Negron was not initially a target of this investigation. (Def. Ex. 6, 26). During their observation, they saw Leathers-Harris remove three blockbuster cards from the mail and give them to Negron, who placed them in her pocket. Negron was thereupon suspended without pay for improper conduct/mail theft. On August 4, 1998 she wrote and signed a statement in which she admitted wrongdoing: "I

realized that what I did was wrong and stupid. I've never done anything like this before. I've always taught my kids to never take things that didn't belong to them. I [sic] never before taken anything from the post office." (Def. Ex. 9)

On September 23, 1998, Tina Negron and Elaine Harris-Leathers were indicted by a grand jury for stealing and aiding and abetting stealing of mail. (Def. Ex. 7). Negron was terminated from her employment with the Postal Service in November 1998 for improper conduct/mail theft. (Def. Ex. 8). On January 5, 1999, the Unemployment Compensation Board of Review determined that the plaintiff was "ineligible for benefits under the provisions of Section 402(e) of the Pennsylvania Unemployment Compensation Law," because her discharge was due to willful misconduct. (Def. Ex. 16).[1] On January 26 1999, after a criminal trial on the mail theft charge, Negron was granted a judgment of acquittal in the Eastern District of Pennsylvania. (Pl. Ex. I). Finally, on March 30, 2000, an arbitration panel held a hearing on Negron's grievance regarding her termination. Both the U.S. Postal Service and the Union were represented at the hearing. On April 24, 2000, the arbitration panel issued an

[1] This decision was affirmed by the Commonwealth Court of Pennsylvania on September 8, 1999. (Def. Ex. 17).

award, denying the grievance and holding that "[t]he removal of Tina Negron from the Postal Service in November 1998 was for just cause." (Def. Ex. 18).

IV. Discussion

The defendant moves for summary judgment on the following grounds: first, the defendant argues that much of the plaintiff's complaint is time-barred. Second, the defendant argues that the plaintiff has failed to establish a prima facie case of discrimination under the Rehabilitation Act. Finally, the defendant argues that, even assuming that Negron has established a prima facie case, she has failed to provide evidence on the basis of which a reasonable jury could disbelieve the defendant's proffered non-discriminatory reason for its actions.

A. Timeliness

The allegedly discriminatory acts challenged by Negron occurred over a span of time from March 1998 to the present.[2] The Postal Service argues that Negron's complaint with respect to most of the challenged acts is time-barred, because of her

[2] **Negron does not seem to be challenging any actions taken by the Post Office in response to her 1996 injury in her complaint, although she has described them as part of the factual background. Even if she were challenging them, however, the same analysis would apply.**

failure to approach an EEOC Counselor within 45 days of the respective incidents as required by the applicable regulation. 29 C.F.R. 1614.105(a)(1). Negron first contacted a Counselor on February 22, 1999. Therefore, her complaint is time-barred with respect to all actions taken prior to January 8, 1999, unless the various employment actions she has challenged constitute a continuing violation.

The continuing violation doctrine is 'premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 n.6 (10th Cir. 1993). The Third Circuit has set forth three factors to be used by a court in determining whether a series of allegedly discriminatory acts are sufficiently related to constitute a continuing violation under this theory:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring ... or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or

> which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Rush v. Scott Specialty Gases, 113 F.3d 476, 482 (3d Cir. 1997), quoting Berry v. Board of Supervisors of Louisiana State Univ., 715 F.2d 971, 981 (5th Cir. 1983).

Applying this test to the facts of this case, the Court finds that the allegedly discriminatory acts do not constitute a continuing violation. First, the plaintiff alleges that each of these acts involve the same type of discrimination. The acts can, however, be separated into two distinct groups: those acts related to reassignment within the Postal Service and those related to her termination and post-termination proceedings. The defendant concedes that all actions regarding her reassignment were related to her disability, though the defendant disputes that these actions were discriminatory. The defendant claims, however, that the plaintiff's termination and all related actions were entirely unrelated to her disability. In view of this distinction, the Court questions whether all the allegedly discriminatory acts can be said to involve the same type of discrimination.

Second, these incidents are discrete events or employment decisions. They do not recur with sufficient frequency to be considered a pattern of discrimination. In Berry, the court cited a bi-weekly paycheck as an example of a frequently recurring act, contrasting this with an "isolated work assignment or employment decision". 715 F.2d at 981. The Postal Service's actions fall into the latter category.

Finally, each decision had a degree of permanence that should have indicated to Negron "that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate." Rush, 113 F.3d at 482. Negron should have been on notice that her employment status had been changed at the time each decision was made: "Waiting to see what would happen next was pointless; the harm, if any, already was inflicted." Id. at 484. In other words, Negron's complaint "addresses discrete instances of alleged discrimination that are not susceptible to a continuing violation analysis." Id. at 483-4.

The plaintiff argues that, even if she has not satisfied the Rush test, she has established a continuing violation under a systemic violation theory. In order to show a

systemic violation, a plaintiff must show the maintenance of a company-wide policy of discrimination that extends into the limitations period. Purrinston v. University of Utah, **996** F.2d 1025, **1028** (10th Cir. **1993**); see also Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. **1980**); Mack v. The Great Atlantic and Pacific Tea Company, **871** F.2d **179** (1st Cir. **1989**).

The Third Circuit has not explicitly adopted this formulation of the continuing violation doctrine. Even assuming, however, that the systemic violation doctrine applies, the plaintiff's argument would have to be rejected, because she was terminated more than 45 days prior to contacting an EEOC Counselor:

> While the continuing discrimination theory may be available to present employees, we do not think this theory has validity when asserted by a former employee. For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date.

Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. **1975**). See also **Elliott** v. Sperry Rand Corporation, 79 F.R.D. 580, **586** (D.Minn. 1978).

In Wetzel v. Libertv Mutual Insurance Company, 508 F.2d 239, 246 (3d Cir. 1975), the Third Circuit held that former employees, whose employment was terminated more than 210 days [the relevant charge filing period] before charges were brought, could not join in a class action challenging discriminatory hiring and promotion practices. Similarly, Negron cannot challenge employment policies that could not have adversely affected her after January 8, 1999, because she was no longer an employee. On this basis, Negron's systemic violation argument must fail.

All of Negron's claims relating to actions taken prior to January 8, 1999 are therefore time-barred. The only claims remaining are those challenging the following actions: (1) the Postal Service's participation in the criminal trial in January 1999; (2) the Postal Service's objection to plaintiff's receipt of unemployment compensation benefits; (3) the Postal Service's opposition to the grievance which the union filed in regard to plaintiff's termination, and (4) the Postal Service's refusal to reinstate her after the judgment of acquittal.

B. Violation of the Rehabilitation Act: Elements

In order to establish a violation of the Rehabilitation Act,.

the plaintiff must prove: (1) that she has a disability, (2) that she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer, and (3) that she was excluded from the position "solely by reason of [her] handicap." Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113 (3d Cir. 1998); Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983).

The burdens of proof and presentation in this case are governed by the Supreme Court's burden-shifting analysis in McDonnell-Douglas v. Green, 411 U.S. 792 (1973), recently clarified in Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2097 (2000). See Newman v. GHS Osteopathic, Inc. Parkview Hospital Division, 60 F.3d 153, 157 (3d. Cir. 1995)(burden-shifting analysis applies to pretext cases under Rehabilitation Act); see also Antol v. Perry, 82 F.3d 1291 (3d Cir. 1996)(same). Under this analysis, the plaintiff must first make out a prima facie case of discrimination. If the plaintiff does so, the defendant must present a non-discriminatory reason for the employment decision. In order to survive summary judgment, the plaintiff must then show that the reason presented by the defendant is pretextual either by showing that the defendant's reason is "unworthy of credence" or by showing that the real

motivation was more likely than not discriminatory. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, **256 (1981);** Fuentes v. Perskie, 32 F.3d **759, 764** (3d Cir. **1994);** Reeves, 120 S.Ct. at 2108.

1. Prima Facie Case

In order to establish a prima facie case of disability discrimination under the Rehabilitation Act, a plaintiff must show that (1) she has a disability; (2) she is otherwise qualified to perform the essential functions of the job; **and (3)** she was nonetheless terminated or otherwise prevented from performing the job. Shiring v. Runyon, **90** F.3d 827, **831 (3d** Cir. **1996).** Neither party disputes that the plaintiff was not reinstated and that she was therefore prevented from doing her job. The Court will briefly analyze the remaining two elements of the prima facie case.

a. Disability

According to the applicable regulations, an individual with a handicap is defined as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 C.F.R. 1614.203(a)(1)(i). "Major life activities means functions, such as caring for one's.

self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1614.203(a)(3). According to an affidavit signed by Negron's treating physician, Lisa M. Scheib, on September 29, 2000, Negron could at that time not walk more than 20 to 30 minutes. (Pl. Surreply, Ex. A). Such a limitation constitutes a substantial limitation on a major life activity. For purposes of this summary judgment motion, therefore, the Court will accept Negron's claim that her ankle tendinitis constitutes a disability under the Rehabilitation Act.

b. Qualified Individual

"Qualified individual with handicap means with respect to employment, an individual with handicaps who, with or without reasonable accommodations, can perform the essential functions of the position in question without endangering the health and safety of the individual or others." 29 C.F.R. 1614.203 (a)(6). The question the Court must address is whether Negron could, with or without reasonable accommodation, perform the reasonable functions of her job. Negron may not have been able to perform the essential functions of a mail carrier job given her physical limitations. See Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996). Negron was, however, qualified to perform the job she had

prior to being terminated from her employment with the Postal Service. The adverse employment actions still at issue in this case are all related to the refusal to reinstate plaintiff to her employment with the Postal Service, not to the Postal Service's earlier decision to reassign Negron to a non-letter carrier job. The Court will therefore assume for purposes of this motion that Negron was a "qualified individual" under the applicable regulations and that she has established a prima facie case of disability-based discrimination under the Rehabilitation Act.

2. Pretext Analysis

The Postal Service asserts that its decision not to reinstate Negron, as well as its opposition to the plaintiff in the various termination-related proceedings, were all based on Negron's removal of items from the mail on the night of August 4th, 1998. The timing of the plaintiff's discharge supports the legitimacy of the defendant's reason. Negron was suspended without pay immediately following her arrest on August 4, 1998 and was discharged a few months thereafter. See Simonetti v. Runyon, 2000 WL 1133066 at *5. The Postal Service has thus satisfied the second prong of the McDonnell Douglas analysis by a providing non-discriminatory reasons for its actions.

The burden then shifts back to Negron to show that the reasons presented by the defendant are pretextual either by showing that the reasons are "unworthy of credence" or by showing that the real motivation was more likely than not discriminatory. Burdine, 450 U.S. at 256; Fuentes, 32 F.3d at 764.

Negron attempts to cast doubt on the defendant's proffered reason in the following two ways. First, she asserts that the defendant has never produced a policy, regulation, or statute identifying the sorts of items Negron took as "mail" or providing that such items are not to be taken from the 'mail." The Court finds this reason unpersuasive, because the plaintiff has admitted in her written statement that she realized her conduct was wrong. (Def. Ex. 9).[3] In addition, the defendant has provided unchallenged deposition testimony, stating that removing items from any mail, including undeliverable mail, was

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[3] In her affidavit, the plaintiff states that she did not know her conduct was wrong until she was told so after having taken the cards from Harris-Leathers. In her sworn statement from that evening, however, the plaintiff wrote: "I realized what I did was wrong and stupid...I (sic) never before taken anything from the Post Office." (Def. Ex. 9). This statement contradicts the plaintiff's assertion that she did not know her conduct was wrong at the time of the incident. The plaintiff also claims, however, that the postal investigator helped her phrase her sentences in the sworn statement. The plaintiff has not produced any deposition testimony from either herself or that postal investigator regarding in what way the investigator may have helped her phrase her statement. She has also not produced any evidence to show that the Postal Service was aware of the fact that the postal investigator may have helped her phrase her statement. Without such evidence, no reasonable jury could find that the Postal Service's proffered reason for its actions was a pretext for discrimination.

prohibited. (Def. Ex. G, 36, 62). Based on the deposition testimony and, more importantly, on Negron's admission of wrongdoing, the Court finds that no reasonable jury could disbelieve the defendant's proffered reason simply because no written policy stating that such conduct was improper has been produced.

Second, the plaintiff suggests that two non-disabled employees, who were also accused of improper conduct, were allowed to return to or continue in their employment with the Postal Service. The plaintiff argues that these comparisons reveal that the defendant's proffered reason is pretextual. The Court finds that no reasonable jury could accept the plaintiff's argument based on the evidence in the record.

Danny Parker, a mail carrier who was discharged for improper conduct was reinstated after an acquittal in a criminal trial. According to the deposition of Beverly Edwards-Littles, an individual had indicated that Parker was giving him checks and that, in return, he was paying Parker for the checks. Subsequently, Parker was acquitted in a criminal trial. In her deposition, Edwards-Littles claimed that Parker was reinstated, because the Postal Service believed that it would have lost a

grievance case before the arbitration panel for two reasons: first, Parker had maintained his innocence throughout the investigations, and second, the individual who had initiated the complaint refused to testify at an arbitration hearing. (Pl. Ex. **K, 34-35).** The plaintiff has provided no evidence to rebut these claims.

The situation involving Parker was therefore not similar to the situation involving the plaintiff. Rather than maintaining her innocence throughout, the plaintiff signed a statement admitting wrong-doing. In addition, the Postal Service had a video-tape of the incident leading to Negron's discharge for improper conduct. The Postal Service did appear before an arbitration panel in plaintiff's case and won, based on the Postal Service's "credible documentary evidence and [the] videotape.,, (Def. Ex. 18).

Another employee, Herman Cockrell, was not discharged, despite allegations that he had falsified records. (Pl. Ex. G, **64-65).** The nature of the accusation against Cockrell is different from that of the accusation against Negron. Negron's conduct undermined the Postal Service's primary purpose, the effective delivery of the public's mail. Cockrell's conduct did,

not affect the mail. The fact that the Postal Service treats conduct that implicates the "sanctity of the mail" (Def. Ex. 18) differently from conduct that does not is supported by plaintiff's own affidavit, in which she states that she was accused of falsifying government records in 1996 without being removed. (Pl. Ex. A). Furthermore, the plaintiff has not produced any evidence showing that the Postal Service's accusations against Cockrell were supported by the sort of documentary and video evidence that the Postal Service used in its arbitration case against Negron.

On the basis of the evidence provided, no reasonable jury could find that the defendant's reason is unworthy of credence or that discrimination was more likely than not the real reason for the defendant's actions. The plaintiff has failed to satisfy her burden of proof on that issue. For all of the above reasons, the defendant's motion for summary judgment is granted.

An appropriate order follows.

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TINA NEGRON	**CIVIL ACTION**
V.	
WILLIAM HENDERSON, in his official capacity as Post Master General, UNITED STATES POSTAL SERVICE :	**N0.99-CV-4472**

ORDER

AND NOW, this 16th day of May , 2001, upon consideration of the defendants' motion for summary judgment and the plaintiff's response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED for the reasons explained in an order of this date.

BY THE COURT:

Mary A. McLaughlin, J.